



Universiteit
Leiden

The Netherlands

The ICAO Council at 80: aviation powers shaping the future of international air law

Truxal, S.J.

Citation

Truxal, S. J. (2025). The ICAO Council at 80: aviation powers shaping the future of international air law. *Annals Of Air And Space Law*, 49, 3-26. Retrieved from <https://hdl.handle.net/1887/4273586>

Version: Publisher's Version

License: [Licensed under Article 25fa Copyright Act/Law \(Amendment Taverne\)](#)

Downloaded from: <https://hdl.handle.net/1887/4273586>

Note: To cite this publication please use the final published version (if applicable).

CITATIONS:

Bluebook 21st ed.

Steven Truxal, *The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law*, 49 *Annals Air & Space L.* 3 (2024).

ALWD 7th ed.

Steven Truxal, *The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law*, 49 *Annals Air & Space L.* 3 (2024).

APA 7th ed.

Truxal, Steven. (2024). *The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law*. *Annals of Air and Space Law*, 49, 3-26.

Chicago 17th ed.

Steven Truxal, "The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law," *Annals of Air and Space Law* 49 (2024): 3-26

McGill Guide 10th ed.

Steven Truxal, "The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law" [2024] 49 *Annals Air & Space L.* 3.

AGLC 4th ed.

Steven Truxal, 'The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law' [2024] 49 *Annals of Air and Space Law* 3

MLA 9th ed.

Truxal, Steven. "The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law." *Annals of Air and Space Law*, 49, 2024, pp. 3-26. HeinOnline.

OSCOLA 4th ed.

Steven Truxal, 'The ICAO Council at 80: Aviation Powers Shaping the Future of International Air Law' (2024) 49 *Annals Air & Space L.* 3

Date Downloaded: Tue Oct 21 09:10:11 2025

Source: <https://heinonline.org/HOL/Page?handle=hein.crasl/nairspl0049&id=19>

Terms, Conditions & Use of PDF Document:

Please note, citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper formatting. Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at: <https://heinonline.org/HOL/License>. The search text of this PDF is generated from uncorrected OCR text. To obtain permission to use this article beyond the scope of your license, please use: <https://www.copyright.com>.

**THE ICAO COUNCIL AT 80:
AVIATION POWERS SHAPING THE FUTURE OF
INTERNATIONAL AIR LAW**

by

Steven Truxal*

S Y N O P S I S

ABSTRACT.....	3
RÉSUMÉ	4
KEYWORDS.....	4
I. INTRODUCTION.....	5
II. THE AVIATION POWERS	7
A. THE PARIS AND CHICAGO REGIMES	7
B. EVOLUTION OF REPRESENTATION	10
C. THE THREE PARTS	12
D. THE TRADITIONAL AVIATION POWERS.....	15
III. REGIONAL AVIATION POWERS.....	16
IV. NEW (NON-TRADITIONAL) AVIATION POWERS.....	20
V. CHANGE IN THE AIR?	21

A B S T R A C T

The year 2024 marks the 80th anniversary of the Convention on International Civil Aviation (Chicago Convention) 1944. Although the Chicago Convention did not enter into force until April 4, 1947, and, in turn, did not establish the International Civil Aviation Organization (ICAO) that exists today until then, the Interim Agreement on International Civil Aviation 1944 immediately created the Provisional International Civil Aviation Organization (PICAO) and the Interim Council of PICAO. By extension, ICAO Council also celebrates its 80th *dies natalis* in 2024. This serves as a useful moment to identify the original and traditional, regional, and new (non-traditional) aviation powers by way of their service on the Council of ICAO and to trace and reflect on their influence and dominance.

* Professor of Air and Space Law, Director of the International Institute of Air and Space Law, Leiden University, The Netherlands.

Also, in 2022, during the 41st Session of the Assembly, there were two changes to the membership of ICAO Council that deserve further consideration. This article discusses the exclusion of the Russian Federation and the inclusion of Qatar as being representative of a shift in the world's recognition of the contemporary aviation powers. It attempts to reflect on the democratic future of international air law *vis-à-vis* the ICAO Council with reference to its changed and changing composition and its quasi-judicial role in settling disputes and differences relating to the interpretation and application of the Chicago Convention and its Annexes.

R É S U M É

L'année 2024 marque le 80^e anniversaire de la Convention relative à l'aviation civile internationale (Convention de Chicago) 1944. Bien que la Convention de Chicago ne soit pas entrée en vigueur avant le 4 avril 1947, moment de l'établissement de l'Organisation de l'aviation civile internationale (OACI) telle qu'on la connaît aujourd'hui, l'Accord intérimaire sur l'aviation civile internationale 1944 a immédiatement créé l'Assemblée intérimaire de l'Organisation provisoire de l'aviation civile internationale (OPACI) et le Conseil intérimaire de l'OPACI. Par extension, le Conseil de l'OACI célèbre également son 80^e *dies natalis* en 2024. Ceci se présente comme un moment utile pour identifier les puissances aériennes pouvant se qualifier d'originelles et traditionnelles, de régionales ou de nouvelles (non traditionnelles) selon leur service au sein du Conseil de l'OACI. Cette qualification permet de retracer l'influence et la dominance qu'elles y exercent et de réfléchir à leur impact.

De plus, en 2022, au cours de la 41^e Session de l'Assemblée, il y a eu deux modifications de la composition du Conseil de l'OACI méritant une considération additionnelle. Cet article discute de l'exclusion de la Fédération de Russie et de l'inclusion du Qatar comme représentant une évolution de la reconnaissance internationale des puissances aériennes contemporaines. Il tente de s'interroger quant au futur démocratique du droit aérien international vis-à-vis du Conseil de l'OACI à la lumière de sa composition changée et changeante et de son rôle quasi judiciaire dans le règlement de disputes et de différends relatifs à l'interprétation et à l'application de la Convention de Chicago et de ses Annexes.

KEYWORDS

Chicago Convention; ICAO Council; International Air Law

I. INTRODUCTION

International civil aviation has traditionally been the exclusive concern of State actors. Just as States recognize the sovereignty and territoriality of other States, they also recognize sovereign airspace.

The airspace of a State includes that above its sovereign territory and territorial waters. Owing to this territorial link, civil aviation affairs are negotiated and regulated between the many State actors. Therefore, the regulatory regime for international civil aviation, the so-called “Chicago System,” is inter-national.¹

Through inter-State dialogue at the specialized UN agency, the International Civil Aviation Organization (ICAO), States agree international rules, common practices, and policies for international civil aviation. The international standards and recommended practices (SARPs), which are adopted by ICAO Council, are found in the Annexes to the Convention.² SARPs are in effect legislation (standards) on the one hand and guidelines (recommended practices) on the other hand.³

Article 44 of the Convention on International Civil Aviation (Chicago Convention) 1944 sets out the general objectives of ICAO, including the mandate “to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.” In this way, ICAO is *the* forum within which international air law is created. Each State holds responsibility for implementation and enforcement of agreed standards by way of domestic law, notwithstanding that aviation safety is of international, thus universal concern.⁴

For the purposes of this article, the States which were most influential in developing the aviation world we live in today are referred to as “traditional aviation powers.” International civil aviation has long been dominated by the traditional aviation powers. They devised the original terms for international civil aviation following the First World War and revised them following the Second World War.

¹ The Chicago System takes its name from the primary source of international law relating to civil aviation, *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) [*Chicago Convention*].

² ICAO Council is vested with competence *inter alia* to adopt international standards and recommended practices (SARPs) under Article 54(l) of the Chicago Convention.

³ That said, some States such as the Netherlands implement as far as possible both ICAO standards and recommended practices in national law.

⁴ See Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Cham: Springer, 2014). Standards and recommended practices are agreed internationally and implemented nationally. See *Chicago Convention*, *supra* note 1 at Annex 2.

In the decades that followed, the dominant aviation powers set out and implemented a global agenda on traffic rights, safety and security, and other universal concerns. Still, Milde criticized the lawmaking process in ICAO as “continuing creeping stagnation” owing to a lack of participation by States.⁵ He has further suggested that “the trend has developed that fewer and fewer States participate in the relevant conferences and meetings or answer questionnaires from ICAO or comment on new proposed standards.”⁶ This calls into question the democratic nature of air law. Does the “silent treatment,”⁷ as Milde called it - in the situations when States either fail to file their differences under Article 38 of the Chicago Convention although they are legally obligated to do so under Article 37, or other States do not call out the non-disclosing States - raise concerns over the ability of the ICAO Council to discharge its “mandatory constitutional obligation”⁸ to report infractions of the Chicago Convention to the ICAO Assembly? And if not, should it not cause greater concern within this elected body?

This article traces the origins of international air law and international treaty-based governance and, along the way, identifies what this author calls the original and traditional, regional, and new (non-traditional) aviation (State) powers by way of their service on the Council of ICAO. Governance has been concentrated with the original and traditional aviation powers, but over time this has developed into multipolarity with regional aviation powers and new entrants seeking greater recognition in the Chicago system. This article also questions the democratic future of international air law *vis-à-vis* the ICAO Council with reference to its composition and its quasi-judicial role in settling disputes and differences relating to the interpretation and application of the Chicago Convention and its Annexes.

⁵ Michael Milde, “Enforcement of Aviation Safety Standards: Problems of Safety Oversight” (1996) 45:1 *German J of Air & Space L* 3 at 7.

⁶ Michael Milde, “Aviation Safety Oversight: Audits and the Law” (2001) 26 *Ann Air & Space L* 165 at 170.

⁷ *Ibid.*

⁸ *Ibid* at 176.

II. THE AVIATION POWERS

A. THE PARIS AND CHICAGO REGIMES

At the *Congrès de la Paix* (“Paris Peace Conference”) that began in 1919, a small group of States met in the Aeronautical Commission of the Paris Peace Conference to explore potential cooperation, including forms of collaboration on the future development of international aviation. The Commission’s membership reflected the division of power between the various allies: two seats each for France, Italy, Japan, and the British Empire, and one seat each for Belgium, Brazil, Cuba, Greece, Portugal, Romania, and Yugoslavia.⁹

For civil aviation, the most significant result of the Paris Peace Conference was the first major multilateral agreement, the Convention Relating to the Regulation of Aerial Navigation (Paris Convention) 1919.¹⁰ The Paris Convention was signed by 27 States on October 13, 1919, and entered into force in 1922. By 1940, the Convention was in force for 33 States, comprising many members of the post-First World War League of Nations, but excluding Brazil, China, the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union), and the United States (U.S.).¹¹

The Paris Convention created the International Commission for Air Navigation (ICAN), a permanent Commission under the direction of the League of Nations.¹² ICAN’s membership initially included two representatives each of France, Italy, Japan, and the British Empire and one delegate from each of the other States.

⁹ See Christopher T Tourtellot, “Membership Criteria for the ICAO Council: A Proposal for Reform” (1981) 11 *Denv J Intl’L & Pol’y* 51 at 57 [Tourtellot, “Membership Criteria”].

¹⁰ *Conférence internationale de navigation aérienne*, Paris 18 mai - 28 juin 1910, *Exposé des vues des puissances d’après les mémorandums adressés au gouvernement français* (Paris, Imprimerie Nationale, 1909); *Convention portant réglementation de la navigation aérienne* (Convention Relating to the Regulation of Aerial Navigation), 13 October 1919, 11 LNTS 173, 1922 UKTS 2 [Paris Convention].

¹¹ The U.S. Congress did not ratify the Charter of the League of Nations owing to the contractual nature of Article X which calls on members of the League to give assistance if another member experiences external aggressions. See Steven Truxal, *Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance* (New York: Routledge, 2017) at 12. As a result, the Paris Convention never received universal acceptance and other attempts were made to codify air law at a regional level, i.e. the Madrid Convention 1926 and the Havana Convention 1928. See Michael Milde, *International Air Law and ICAO*, 3rd ed (The Hague: Eleven International Publishing, 2016) at 12-3.

¹² *Paris Convention*, *supra* note 10, art 34.

By 1929, the composition of ICAN had been changed to one representative of Great Britain and one of each of the British Dominions and of India, alongside one representative of each of the other contracting States, including France, Italy and Japan. Later, each State had only one vote thus ICAN appeared to function “on the basis of uniform equality.”¹³ The original, international treaty-based, aviation powers were France, Italy, Japan, and the British Empire (Great Britain).

ICAN had a Secretariat, which was its only permanent organization, directed by a Secretary General. Albert Roper, commonly known as the architect of the Paris Convention, was Secretary General of ICAN and later served as the first Secretary General of ICAO.¹⁴ In 1932, Roper wrote a piece on the organization and program of ICAN, pointing out that ICAN is:

- (1) a Council charged with ensuring the application of the Convention and its normal evolution by proposing in due season to the contracting States the amendments called for by the development of international air navigation;
- (2) an international parliament having power at all times to adapt the technical regulations to the requirements of air traffic;
- (3) a tribunal settling in first and last instance disagreements which may arise between contracting States with regard to the technical regulations which it has power to enact;
- (4) an advisory committee giving its opinion on questions which the States may submit for examination; and
- (5) an organization for the collection and dissemination of all information a knowledge of which is indispensable to airmen.¹⁵

¹³ Tourtellot, “Membership Criteria”, *supra* note 9 at 57.

¹⁴ Albert Pelsser, “Albert Roper: The first Secretary General of ICAO and Architect of the 1919 Paris Convention” (2 May 2019), online: <unitingaviation.com/news/general-interest/albert-roper-the-first-secretary-general-of-icao-and-architect-of-the-1919-paris-convention/>.

¹⁵ Albert Roper, “The Organization and Program of the International Commission for Air Navigation (C.I.N.A.)” (1932) 3 J Air L & Com 167 at 174. There are vivid similarities between the duties and responsibilities of ICAN on the one hand and the ICAO Council (and for the final point also the Secretariat) on the other hand, as set out in Article 54 of the Chicago Convention. On the ICAO Council as a court, see Saachi Juneja, “Can the ICAO Council Function as a Judicial Institution? The Decision of the ICJ on the Dispute between Qatar and Saudi Arabia, Bahrain, Egypt and the United Arab Emirates” (2021) 46 Ann Air & Space L 107.

In the final year of the Second World War and following consultations with the Allies, the U.S. Government invited representatives from 55 States to travel to Chicago and negotiate a new treaty, which would become the Chicago Convention. On December 7, 1944, once the 54 State-participants¹⁶ attending the Chicago Conference had drafted and agreed a suitable text, the Chicago Convention was opened for signature. Unlike the Paris Convention 1919, the U.S. is party to the Chicago Convention, having ratified it in 1946.¹⁷ Brazil and China also ratified the Convention in that same year.¹⁸ In 1970, the Soviet Union notified the U.S. Government of its adherence to the Chicago Convention.¹⁹

As there were delays expected with respect to State ratifications, the Chicago participants signed an Interim Agreement on International Civil Aviation 1944, which immediately created the Provisional International Civil Aviation Organization (PICAO). PICAO served as temporary advisory and coordinating body and consisted of an Interim Council and Interim Assembly.²⁰

Twenty PICAO Interim Council Members were elected in Chicago in 1944²¹ in three categories:²²

CATEGORY A

Air Transport

United Kingdom, U.S., Netherlands, Brazil, France, Mexico, and Belgium

¹⁶ Including two observer nations: (1) the Kingdom of Denmark, which was occupied by Nazi Germany - the Danish Ambassador attended as representative of the "Free Danes," and (2) the Kingdom of Thailand, which was occupied by Japan - the Thai Ambassador attended in a personal capacity. The Soviet Union delegation was recalled in October 1944 after reaching Winnipeg, Canada. Saudi Arabia declined the invitation. See Tourtellot, "Membership Criteria", *supra* note 9 at 54; Paul T David, "A Review of the Work at the Chicago Conference (from a Secretariat Point of View)" (1994) 19 Ann Air & Space L 55 at 61.

¹⁷ 49 USC § 40103.

¹⁸ *Chicago Convention*, *supra* note 1 at [online: <treaties.un.org/Pages/showDetails.aspx?objid=0800000280163d69&clang=_en>](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280163d69&clang=_en).

¹⁹ 764 UNTS Annex B No. 102, *online: <treaties.un.org/doc/Publication/UNTS/Volume%20764/volume-764-B-102-English_French.pdf>*.

²⁰ ICAO, "The History of ICAO and the Chicago Convention", *online: <icao.int/about-icao/History/Pages/default.aspx>*.

²¹ The Assembly decided that the interim Council should be limited to 21 members, of which Latin American and European countries would each have six seats rather than an originally proposed ratio of 7:5. One seat was left "open" for the Soviet Union. See David, *supra* note 16 at 93.

²² See David, *supra* note 16 at 92.

CATEGORY B*Navigational Facilities*

Canada, Cuba, Norway, Iraq, and Peru

CATEGORY C*Geographical Representation*

China, Australia, Egypt, Czechoslovakia, Turkey, El Salvador, Chile, and Colombia

Recalling the original aviation powers, the then-Axis powers Germany, Italy, and Japan are clearly missing from the above composition. Beginning in June 1945, the Interim Council met in Montreal, Canada.²³

The Chicago Convention entered into force on April 4, 1947.²⁴ In the inaugural ICAO Council elected by the First Session of the ICAO Assembly in May 1947, Sweden replaced Norway, Argentina replaced Columbia, and Portugal was added for a total of 21 Council Member States in line with Article 50(a) of the Chicago Convention.

B. EVOLUTION OF REPRESENTATION

Article 50(b) of the Chicago Convention provides specific criteria for election of States' representatives on ICAO Council, so as to:

give adequate representation to 1) the States of chief importance in air transport; 2) the States not otherwise included which make the largest contribution to the provision of facilities for international air navigation; and 3) the States not otherwise included whose designation will ensure that all the major geographic areas of the world are represented.

²³ On June 6, 1946, during the first PICAO Interim Assembly, Montreal was chosen by the Interim Assembly as the permanent seat of ICAO in accordance with Article 45 of the Chicago Convention. See ICAO, "Selection of Montréal as the Permanent Seat of ICAO", online: <icao.int/about-icao/History/Pages/selection-of-montreal-to-host-icao.aspx>.

²⁴ Fifty-two States signed the Chicago Convention on December 7, 1944. The Convention came into force on April 4, 1947, on the thirtieth day after deposit by Spain to the U.S. Government. See Abeyratne, *supra* note 4 at 3.

In 1947, the distribution of States in the first ICAO Council in these three “parts” was 8:7:6, that is Belgium, Brazil, Canada, France, Mexico, Netherlands, United Kingdom, and U.S. in Part I; Argentina, Australia, China, Egypt, India, Ireland, and Portugal in Part II; and Chile, Czechoslovakia, Iraq, Peru, Sweden, and Turkey in Part III.

Over time, as the number of Contracting States to the Chicago Convention has increased, ICAO membership has grown. This expansion sparked several calls from States to increase the number of seats on ICAO Council, first to 27 (between 1962 and 1973), then to 30 (between 1973 and 1980), and later to 33 (between 1980 and 2002).²⁵ Between 2022 and the moment of writing, there have been 36 seats on ICAO Council.²⁶ The 39th Session of the Assembly (2016) adopted a Protocol to amend Article 50(a) of the Chicago Convention to increase the number of Council members from 36 to 40. At the time of writing, the requisite number of ratifications (128) for this Protocol has not yet been reached.²⁷

For States, there are pros and cons to weigh when considering whether to ratify the amendment to the Convention and therefore again increase the number of seats in the ICAO Council Chamber. With 193 Contracting States to the Chicago Convention and thus 193 ICAO Member States, the present Council of 36 represents just 18.6 per cent of the membership. More seats (40) would suggest greater proportional representation (20.7 per cent). Does the addition of new seats dilute the power of the long-sitting Council members? Quite some ICAO Member States do not have airports or (significant) aviation industries. Should they also be represented in the Council? It may be that their main qualification for ICAO membership is State sovereignty. Nevertheless, all but one UN Member State (Lichtenstein) is an ICAO Member State, and the Cook Islands are members of ICAO but not of the UN. There is obviously global representation in the ICAO Assembly.

²⁵ As decided, respectively, at the 13th (Extraordinary) Session of the Assembly, 1961, the 17th (Extraordinary) Session, 1971, and the 21st Session of the Assembly, 1974. See Truxal, *supra* note 11 at 139.

²⁶ As decided at the 28th Session of the Assembly (1990). It is noted that a proposal to expand ICAO Council to 39 seats was presented at the 33rd Assembly (2010). See ICAO, “Increasing ICAO Council seats to 39” (1 October 2010) Working Paper ICAO Doc A37-WP/333, online: <icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp333_en.pdf>.

²⁷ At the time of writing, 99 Contracting States have notified their ratification of the amendment. See ICAO, “Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 50(a))” (6 October 2016) ICAO Doc 10077, online: <icao.int/secretariat/legal/List%20of%20Parties/50a_2016_EN.pdf>.

Tourtellot argued in 1981 that the “structure of article 50(b) attempts to a compromise between the elements of eminence and equality, but the compromise no longer seems feasible in light of the new political influence of the South.”²⁸ That was more than half the Chicago Convention’s lifetime ago - have the increased numbers of seats in Parts II and III not provided opportunities for the Global South in the second half of the Convention’s lifetime?

Tourtellot put forward, at the time of the former increase to 33 seats over four decades ago, that:

ICAO has enlarged the Council occasionally in a haphazard attempt to keep up with the expanding membership ... Beyond a certain limit, which the Council is rapidly reaching, such a body begins to lose its character as a small, executive, efficient entity, and starts to resemble unwieldy universal bodies like the various assemblies.²⁹

He had then, and still has, a fair point: one must be careful to meet the optimal limit, whatever that may be, lest the ICAO Council may lose its effectiveness and respect. On the other hand, the overall ICAO membership was smaller then, at 150 Contracting States, with the ICAO Council amounting to 22 per cent representation of the Assembly. Was that to be the high watermark? According to Hong, “[w]hile the growing number of members improved the representative character of the Council, it did not improve its efficiency.”³⁰ An increase to the multipolarity of the ICAO Council and thus the governance of ICAO may indeed be a detriment to efficiency. One cannot always have one’s cake and eat it, too.

C. THE THREE PARTS

The rationale for increasing the number of States involved in governance of ICAO was to widen representation and participation, especially in response to the increase in air traffic, the development of new markets, and the emergence of sub-regions underrepresented on the ICAO Council. In reality, only Part II and Part III are available as the traditional aviation powers have retained their seats throughout the years, with one notable exception discussed below in Section V.

²⁸ Tourtellot, “Membership Criteria”, *supra* note 9 at 59.

²⁹ *Ibid* at 74.

³⁰ Soon Kil Hong, “Legal Problems and Solutions for Civil Aviation toward the 21st Century: An Asian-Pacific Perspective” (1995) 20 *Ann Air & Space L* 231, 234-5.

In making the three categories (Parts I, II, and III), it would appear that the drafters of the Chicago Convention intended that election of the ICAO Council, and indeed the PICAQ Interim Council (Categories A, B, and C), should ensure an economic, technical, and geographic balance. The Convention fails to define “chief importance,” for example, though it is a measure clearer than “air transport.” Should “chief importance” be taken to “imply the [States boasting the] most far-flung airlines, the greatest numbers of international passengers, or the largest manufacturing industry?”³¹ In fact, the unpopular proposals made in Chicago in 1944 suggested a (through today’s lens) less inclusive, but more clear-cut approach. For instance, the U.S. proposed 15 seats on the ICAO Council with two seats each reserved for the U.S., Soviet Union, and the British Commonwealth (Great Britain), one each for Brazil, France, and China, three from Europe, two from Latin America, and one from Africa or Asia.³²

In short, there is no further elaboration on the categories available for the Assembly to assist States in determining the meaning of “chief importance” or how to weigh up what constitutes “largest contribution,” or, for that matter, what constitutes “adequate representation.” Rather, when they cast votes by secret ballot, States “express their political judgement whether a candidate State meets the respective criteria,” as Michael Milde put it.³³ “It is a common part of the political strategy and tactics that States do not cast a vote for all vacancies but initially - after multilateral coordination - vote only for a favoured few States on the list assuring their election...”³⁴ This can be seen in the practice of State voting in relation to rotation groups.

With only two exceptions since the establishment of ICAO, the election of the Council has been held in the three parts that correspond to Article 50(b) of the Chicago Convention and referred to as Parts I, II, and III States.³⁵ The Assembly agrees on the number of States that will be elected in each of the three parts as soon as possible after the opening of the session, in line with Rule 55(b) of the *Standing Rules of Procedure of the Assembly* (as amended).³⁶

³¹ Tourtellot, “Membership Criteria”, *supra* note 9 at 59.

³² *Ibid* at 60. See also David, *supra* note 16 at 72.

³³ Milde, *supra* note 11 at 153.

³⁴ *Ibid* at 142.

³⁵ ICAO, “Working Paper Assembly 41st Session - Plenary - Agenda Item 5: Election of Member States to be represented on the Council” (3 November 2021) ICAO Doc A41-WP/2 at para 2.2 [ICAO Election of Member States].

³⁶ ICAO, “Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization” (2014) 8th ed., ICAO Doc 7600/8, online: <icao.int/publications/Documents/7600_8ed.pdf>.

The exceptions arose in 1950 and 1953. In 1950, there were only 20 States as candidates for then-21 Council seats.³⁷ The Assembly suspended the three parts rule, and the candidates were elected in a single secret ballot with the 21st seat filled at the next session, in 1951.³⁸ The same procedure was followed in 1953, when there were 21 States as candidates for the same number of seats.³⁹ Between 1962 and 1971, again in three categories, the number of seats was 27, and nine seats were allocated in each part.⁴⁰ The practice of adopting an even distribution between the three parts was continued until 1980. Between 1980 and 2004, the division was 10:11:12, respectively. Between 2004 and 2022, the division was 11:12:13, respectively.⁴¹ By example, the previous ICAO Council, as elected in 2019 for the period 2019-2022, is detailed below:

PART I

States of chief importance in air transport

Australia, Brazil, Canada, China, France, Germany, Italy, Japan, Russian Federation, United Kingdom, and U.S.

PART II

States which make the largest contribution to the provision of facilities for international civil air navigation

Argentina, Colombia, Egypt, Finland,* India, Mexico, Netherlands,* Nigeria, Saudi Arabia, Singapore, South Africa, and Spain.

PART III

States ensuring geographic representation

Costa Rica,* Côte d'Ivoire,* Dominican Republic,* Equatorial Guinea,* Greece,* Malaysia, Paraguay,* Peru,* Republic of Korea, Sudan,* Tunisia,* United Arab Emirates, and Zambia.*

* States that were newly included in 2019.

³⁷ ICAO Election of Member States, *supra* note 35.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ ICAO Election of Member States, *supra* note 35 at Appendix A.

D. THE TRADITIONAL AVIATION POWERS

At first glance, on comparing the list of States of chief importance (Part I) elected at the First Session of the Assembly (1947) and those elected at the 40th Session of the Assembly (2019), it appears that six States have retained their positions for 75 years. Indisputably therefore, Brazil, Canada, France, United Kingdom, and the U.S. are the Chicago regime aviation powers. Other States that may be added to this list, owing to the success within which they have won ICAO Council elections, are Australia, China, the U.S.S.R. (Russian Federation), Argentina, India, Egypt, Italy, Spain, Japan, and Germany.

Australia has always had a seat on ICAO Council, though as a Part II State in 1947 and 1971/1973. The Republic of China held a seat in Part II in 1947, and the People's Republic of China, established in 1949, held a seat in Part II uninterrupted between 1974 and 2003. Since 2004, China has been a Part I State on ICAO Council.

The Soviet Union gained a seat in Part I in 1971, which it held until the U.S.S.R. was dissolved. The Soviet Union's representative on ICAO Council in 1990, who was Soviet, was replaced by a Russian when the U.S.S.R. membership was transferred to the Russian Federation.⁴² The Russian Federation gained a Part I seat in 1992, which it retained uninterrupted until 2022.

Argentina, Egypt, and India have been called "life-long representatives."⁴³ Argentina and India have remained on ICAO Council every year as Part II States.⁴⁴ Egypt has held a seat in Part II for a significant majority of years since 1947.

Admitted to ICAO in 1947, Italy gained and has retained its seat on ICAO Council since 1950 (in Part I since 1962), Spain since 1951, and Japan since 1956 (in Part I since 1968).⁴⁵ In 1955, West Germany applied for admission and was elected to ICAO Council in 1959.⁴⁶ The German seat has been held first by West Germany and, since 1992, by a unified Germany, uninterrupted since 1959 (in Part I since 1965).

⁴² David MacKenzie, *ICAO: A History of the International Civil Aviation Organization* (Toronto: University of Toronto Press, 2010) at 364. See *Chicago Convention*, *supra* note 1.

⁴³ Robert I McLaren, *Civil servants and public policy: A comparative study of international secretariats* (Waterloo: Wilfrid Laurier University Press, 1980) at 70.

⁴⁴ With the exceptions of 1950 and 1953, when the parts rule was suspended.

⁴⁵ *Ibid.*

⁴⁶ See MacKenzie, *supra* note 42 at 225-7. See also Milde, *supra* note 11 at 31-3.

The original group of (Paris regime) aviation powers (France, Italy, Japan, the United Kingdom) has expanded post-Chicago to include Brazil, Canada, and U.S., constituting the world's traditional aviation powers. Over time, first Australia and much later China and the Russian Federation also joined the Part I States, which earns them each a special "traditional+" status. With that said, the Russian Federation was not reelected in 2022 to ICAO Council let alone in Part I, leaving Australia and China as the only two additional States to join the traditional powers. Australia and China were both members of the PICAQ Interim Council, and as for its remaining members, many aviation powers have retained representation on a regional basis since holding the first seat in 1944.

III. REGIONAL AVIATION POWERS

ICAO membership was impacted by the fall of the Berlin Wall in 1989 and the end of the Cold War in 1991, which ushered in a rush of new members. This section will introduce regional aviation powers.

Over the years, numerous States have formed so-called "rotation groups" (or cooperation groups) to ensure their continuous, regional representation on ICAO Council. This was the case from the very start for the Scandinavian countries, Sweden, Denmark, and Norway. Between them and in that order, they have rotated an ICAO Council seat starting in 1947, most likely out of the smaller States' common fear of underrepresentation.⁴⁷ They expanded the cycle only in 1977 with the inclusion of Finland. The group, NORDICAO, now includes all the Nordics plus two of the Baltics.

According to ICAO, "[m]ore than 60 States, approximately one third of ICAO Member States, are represented by a Council member who is a member of a rotation group."⁴⁸ States in each group stand for election to ICAO in rotation as agreed with other group members. The eight rotation groups officially established within ICAO are set out on the following page.⁴⁹ Where applicable, an asterisk next to a State indicates that it is, at the time of writing, an ICAO Council Member.

⁴⁷ See Tourtellot, "Membership Criteria", *supra* note 9 at 66.

⁴⁸ ICAO, "ICAO States Today and Tomorrow" (2016), online: <[icao.int/publications/journalsreports/2018/ICAO%20States_Today_Document.pdf](https://www.icao.int/publications/journalsreports/2018/ICAO%20States_Today_Document.pdf)>.

⁴⁹ Note that Venezuela and Colombia form a ninth rotation group.

- 1) **NORDICAO:**⁵⁰ Denmark, Estonia, Finland, Iceland,* Latvia, Norway, and Sweden
- 2) **Central European Rotation Group:** Bulgaria, Czechia, Greece, Hungary, Lithuania, Poland, Romania,* Slovenia, and Slovakia
- 3) **ABIS:**⁵¹ Austria,* Belgium, Croatia, Ireland, Luxembourg, Netherlands, Portugal, and Switzerland
- 4) **Black Sea-Caspian Group:**⁵² Azerbaijan, Georgia, Moldova, Turkey, and Ukraine
- 5) **CARICOM:**⁵³ Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Guyana, Haiti, Jamaica,* Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago
- 6) **Central American Rotation Group:** Belize, Costa Rica, El Salvador,* Guatemala, Honduras, Nicaragua, and Panama
- 7) **Maghreb States Rotation Group:** Algeria, Libya, Mauritania, Morocco, and Tunisia*
- 8) **Southern African Development Community Rotation Group:**⁵⁴ Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa,* Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe*

When a listed States holds a Council seat, they may advocate for their own national interests and for the interests of States in their respective rotation groups. Rotation groups may therefore exercise power through the candidate which currently occupies the group's Council seat.

⁵⁰ See NORDICAO, "The Nordic Delegation to ICAO: About us", online: <nordicao.ca/about>. Between 1947 and 1974, Sweden, Denmark, and Norway rotated in the Scandinavian seat before it became a *Nordic* seat instead, with the inclusion of Finland and Iceland.

⁵¹ ABIS Group, "About us", online: <abisgroup.org/about-us>. The ABIS Group States have been represented on ICAO Council and citizens from the ABIS Group States have been appointed to the Air Navigation Commission every year since 1980.

⁵² Established in 2016 to prepare for ICAO Council elections, this group is the youngest rotation group. See ICAO, "Second High-Level Safety Conference 2015 (HLSC 2015) Planning for Global Aviation Safety Management" (2015) ICAO Doc HLSC/15-IP/15, online: <icao.int/Meetings/HLSC2015/Documents/IP/ip022_en.pdf> at 3.1.

⁵³ See CARICOM, "Caribbean Community", online: <caricom.org>.

⁵⁴ SADC, "About SADC", online: <sadc.int>.

Success depends on close coordination and consensus, trust, and vesting authority in the candidate as designated representative. As such, participation in rotation groups is evidence of regional aviation power rather than power of individual States. States in rotation groups therefore collectively are ‘merely’ regional aviation powers through the exercise of their duties on ICAO Council. As Tourtellot puts it, “states no longer feel that category III affords an adequate guarantee of representation. The formation of the coalitions was necessary to guarantee states with similar interests adequate representation now that an increasing number of states are seeking category III seats.”⁵⁵ Thus, the rotation groups can be seen as a creative way for States to participate directly or indirectly, for example as deputy State of the Council Member State, in this otherwise restricted means of ICAO governance. Less positively, these agreements between States “arguably sidestep the spirit of the Convention by usurping a function of the electoral process,” given that the ICAO Assembly is presented with prearranged candidacies.⁵⁶ With that said, each State works in connection with one of the four regional organizations of ICAO: the Arab Civil Aviation Organization (ACAO), the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC). While regional organizations often work together on a bilateral basis and in hybrid meetings, it is interesting to note that the first-ever formal meeting of the four regional organizations was held in 2023, represented by heads of the respective secretariats and hosted by ECAC.⁵⁷ According to ECAC:

[t]he participants shared views and lessons learned on the main outcomes of the 41st session of the ICAO Assembly and on regions’ ambitions for the ICAO Assembly in 2025. They also reiterated their commitment to the ratification of the two 2016 Protocols amending the Chicago Convention to increase the number of seats in the ICAO Council and Air Navigation Commission.⁵⁸

⁵⁵ Tourtellot, “Membership Criteria”, *supra* note 9 at 65.

⁵⁶ *Ibid.*

⁵⁷ The meeting was organized and hosted by ECAC. ECAC, “ECAC President and Executive Secretary meet with sister organisations in Paris” (7 February 2023), online: <[ecac-ceac.org/news/805-ecac-president-and-executive-secretary-meet-with-sister-regional-organisations-in-paris#:~:text=Paris%20%207%20February%202023%20-%20ECAC,Commission%20\(LACAC\)%20%20joining%20ECAC](https://ecac-ceac.org/news/805-ecac-president-and-executive-secretary-meet-with-sister-regional-organisations-in-paris#:~:text=Paris%20%207%20February%202023%20-%20ECAC,Commission%20(LACAC)%20%20joining%20ECAC)>.

⁵⁸ *Ibid.* The most recent amendment, approved by the 39th Session of the Assembly in October 2016, will expand the membership of the Air Navigation Commission from 19 to 21 seats, pending sufficient State ratifications.

This development demonstrates the continuity of collaboration between the different regions of the world alongside the work of the Council, Air Navigation Commission, and Secretariat of ICAO in Montreal in the years between the Assembly.

Another more explicit exception to the argument for the “mere” nature of regional aviation powers is the representation of Member States of the European Union (EU) on ICAO Council. In the current set-up, six EU Member States hold ICAO Council seats, plus Iceland (as a member of the European Economic Area (EEA) and part of the EU Single Market). Including the United Kingdom, there are at least eight Council seats that will, as a status quo, continue to be held by ECAC Member States. This amounts to European representation in the international forum of over 22 per cent. On the one hand, this appears to be an appropriate representation of Europe (24 per cent) when viewed as a proportion of the number of passengers travelling by air in Europe (820 million in 2022)⁵⁹ compared with global traffic (around 3.4 billion in 2022).⁶⁰ On the other hand, the EU and EEA Member States closely coordinate their positions, which could be seen as amounting to an “overrepresentation” of Europe on ICAO Council and indeed in the Assembly. The EU opened a representation office at ICAO in 2007, which is accredited to the Canadian Government by way of the Delegation of the European Union to Canada.⁶¹ Additionally, not all the world’s aviation markets were fully open in 2022 due to the ongoing Coronavirus pandemic at that time.

In terms of continuity of representation post-Chicago, of the 20 States on the PICAO Interim Council, seven are traditional+ aviation powers. Egypt, India, and Mexico generally hold Part II seats. Aside from Iraq and Peru, the remainder (including Czechoslovakia, now two sovereign States: Czechia and Slovakia) secure representation through their regional rotation groups in Part II or Part III.

⁵⁹ Eurostat, “Air Transport Statistics” (November 2023), online: <ec.europa.eu/eurostat/statistics-explained/index.php?title=Air_transport_statistics>.

⁶⁰ IATA, “Air Passenger Market Analysis” (December 2022), online: <[iata.org/en/iata-repository/publications/economic-reports/air-passenger-market-analysis---december-2022/](https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-market-analysis---december-2022/)>.

⁶¹ European Union, “The European Union at ICAO”, online: <transport.ec.europa.eu/transport-modes/air/international-aviation/european-union-icao_en>.

IV. NEW (NON-TRADITIONAL) AVIATION POWERS

New (non-traditional) aviation powers have also come into existence since 1944, as this section will discuss. These new aviation powers challenge the entrenchment of the traditional aviation powers through a different means: market power. For instance, Singapore and the United Arab Emirates (UAE) have through their respective flag carriers, Singapore Airlines on the one hand and Emirates and Etihad on the other hand, increased their dominance on the global market for air transport. Evidently, Singapore and the UAE recognize the economic potential of international civil aviation and choose to prioritize their airline businesses. In turn, the voices of these new aviation powers have earned greater recognition at ICAO. Singapore was first elected to ICAO Council in 2003; it has been successfully re-elected ever since.⁶² The UAE has remained on ICAO Council since they were first elected in 2007.⁶³ Singapore and UAE are certainly new (non-traditional) aviation powers.

At the same time, geopolitical infighting between State actors in the aviation community presents challenges for aviation. Take for instance long-standing tensions between India and Pakistan as well as the semi-recent dispute between Egypt, Saudi Arabia, Bahrain, and the UAE on the one side and Qatar on the other. The “blockade” of Qatar impacted not only Qatar Airways but also its partner airline, British Airways, and others flying to the region. Qatar Airways is the only of the major three Gulf carriers to have joined a global airline alliance, and, as flag carrier, it became victim to the political blockade of Qatar.⁶⁴

Interestingly, the drafters of the Chicago Convention intended that Council Members should not have a conflict of interest. Article 50(c) of the Chicago Convention provides that “no representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.” Even though States which own airlines - even if indirectly - have and continue to sit on ICAO Council, there is no evidence to suggest that Article 50(c) has ever been invoked.

⁶² 34th Session (Extraordinary) of the Assembly (2003).

⁶³ 36th Session of the Assembly (2007).

⁶⁴ This author does not seek to pass political judgement here.

Increased capabilities in international civil air navigation have also given rise to new States of growing importance in air transport. These States make a large and important contribution in the provision of air navigation facilities.

Whilst legitimacy and authority have long rested with the hegemony, the traditional aviation powers, this article observes the growing impetus to reframe authority and build more productive interaction within the newly emerging “aviation community” space, which includes regional and new (non-traditional) aviation powers. The appearance and rapid growth of new global airlines as participants in the aviation community and, for some, the State actors behind such State enterprises suggest the need to develop a new governance of civil aviation, in light of the proliferation of actors and participants in the global aviation community.⁶⁵

We are coming upon a new period in aviation where growth is highest amongst the new (non-traditional) aviation powers. Will the aviation community - as opposed to traditional aviation powers - emerge as the new authority on future matters affecting global aviation? Should we anticipate a radical change in the type of decision-making and design of norms and processes for global aviation in future? Are we witnessing movement from the traditional contractual model of international law towards a non-consensual model⁶⁶ that reflects community values, rather than purely State interests through the use of norms and processes?

V. CHANGE IN THE AIR?

In preparation for the 41st Session of the Assembly (2022), the Council recommended that the maximum number of seats to be elected in the three parts of the election should be 11:12:13, respectively.⁶⁷ The same division was adopted by the Assembly. In the election for Part I, the 11 States occupying the Part I seats since 2004 stood for election. The Russian Federation did not secure a majority vote for Part I, and it had not put itself forward for Part II nor Part III.⁶⁸

⁶⁵ See Truxal, *supra* note 11.

⁶⁶ Nico Krisch, “The Decay of Consent: International Law in an Age of Global Public Goods” (2015) 108:1 *Am J Int'l L* 108.

⁶⁷ Hong, *supra* note 30 at 1.

⁶⁸ ICAO, “Candidatures for election to the Council - Parts I and II” (29 September 2023), online:

<[icao.int/Meetings/a41/Documents/FORMAL%20LIST%20OF%20CANDIDATE%20MEMBER%20STATES%20PART%20I-%20-%20PART%20II.pdf](https://www.icao.int/Meetings/a41/Documents/FORMAL%20LIST%20OF%20CANDIDATE%20MEMBER%20STATES%20PART%20I-%20-%20PART%20II.pdf)>; ICAO, “Candidatures for election to the Council - Part III” (3 October 2023), online:

In this unprecedented situation, the Assembly decided to move the unoccupied Part I seat to the Part III election. The parts distribution thus became 10:12:14, respectively. As one of the State candidates for Part III that secured a majority of the total number of Contracting States' votes, Qatar earned the additional (14th) Part III seat. In fact, Qatar received 160 votes (of 175 cast), second in Part III only to the UAE with 161 votes.⁶⁹

The ICAO Council, as elected at the 41st Session of the Assembly (2022) for the period 2022-2025, is detailed below:

PART I

States of chief importance in air transport

Australia, Brazil, Canada, China, France, Germany, Italy, Japan, United Kingdom, and the United States.

PART II

States which make the largest contribution to the provision of facilities for international civil air navigation

Argentina, Austria,* Egypt, Iceland,* India, Mexico, Nigeria, Saudi Arabia, Singapore, South Africa, Spain, and Venezuela.*

PART III

States ensuring geographic representation

Bolivia,* Chile,* El Salvador,* Equatorial Guinea, Ethiopia,* Ghana,* Jamaica,* Malaysia, Mauritania,* Qatar,* Republic of Korea, Romania,* United Arab Emirates, and Zimbabwe.*

* States that were newly included in 2022.

<icao.int/Meetings/a41/Documents/FORMAL%20LIST%20OF%20CANDIDATE%20MEMBER%20STATES%20PART%20III.pdf>.

⁶⁹ ICAO, "Results - Ballot Part 3: (2022), online: <icao.int/Meetings/a41/Documents/A41%20Election%20of%20the%20Council%20Results%20Part%20III.pdf>.

While it is commonplace for States in Parts II and III occasionally to lose ICAO Council elections, it is less true for those in rotation groups. However, Part I States held their seats on what appeared to be a permanent basis, until 2022. The argument for the existence of a *de facto* permanent membership on the ICAO Council since its inception can no longer be made.⁷⁰ Is this a one-off response of the international aviation community, taken solely in response to Russia's invasion of Ukraine? Or does it suggest that the Part I seats should no longer be considered as "grandfather rights"? At the next General Assembly in 2025, there may be greater demand for seats in Part II or Part III by States wishing to participate in ICAO governance, particularly by those aspiring and new (non-traditional) aviation powers that, just as some airlines avoid global alliances, are not committed to regional rotation groups but rather 'go it alone.'

What will the future of international governance look like in a world in which a greater number of voices demand recognition? As former UN Secretary-General Kofi Annan argued, "[o]ur post-war institutions were built for an inter-national world, but we now live in a global world. Responding effectively to this shift is the core institutional challenge for world leaders today."⁷¹ For international civil aviation, will there be greater engagement in multilateralism by way of ICAO or a less effective ICAO owing to greater multipolarity? New aviation powers have shown a commitment to building mutually beneficial partnerships. Challenges facing the aviation community cannot be solved solely within national boundaries; ICAO States must work together. This means that *all* States, including traditional aviation powers, regional aviation powers (via rotation groups but also noting the special situation of EU coordination), and new (non-traditional) aviation powers, must find a way to avoid multipolarity and, instead, respond as partners alongside non-State actors and airlines in the global aviation community.

This article has demonstrated that the governance of ICAO by way of its Council has been stable and, especially with the rotation groups, also predictable. This predictability was put to the test at the 41st Session of the Assembly in 2022. The "denial" by the international aviation community of Russia's long-standing role in ICAO governance confirms that the multipolar world will not accept disrespect for international (air) law. At the same time, and but for Russia's actions, Qatar has been rewarded for its role in the global aviation business; it is perceived - and accepted - as a new aviation power with its new seat on ICAO Council.

⁷⁰ See Hong, *supra* note 30 at 235.

⁷¹ Kofi Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations Department of Public Information, 2000) at 11.

The democratic nature of international air law, taking as a representative case study of this the governance of ICAO, appeared to be relatively settled and secure, at times even inflexible. The Chicago Convention and the wider Chicago System offer a flexible regime for the governance of international civil aviation, and it has and continues to adapt to reflect balanced representation on the ICAO Council.

What of the democratic future of international air law? Contemporary changes and challenges demand that ICAO move beyond standards to exercise greater global governance. With reference to its development of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA) and core economic principles for consumer protection and fair competition, ICAO proves its potential for adopting new forms of decision-making, which reflects the common interest of the global aviation community rather than merely State interest.

Still, there are weaknesses. While it is rare that the dispute settlement mechanism provided for under Article 84 of the Chicago Convention is invoked, there has been a semi-recent acceleration in the number of disagreements arising between States that are brought to ICAO Council. For context, as of the start of the 41st Assembly in September 2022, there had been, “[t]hroughout ICAO’s history, a total of ten disputes presented to the Council for settlement.”⁷² An eleventh dispute was presented in 2023 and a twelfth in early 2024.⁷³ The first six cases spanned 1952 and 2000, and five were filed between 2000 and 2023. There are two ongoing disputes: (1) Australia and the Netherlands *versus* the Russian Federation (MH17);⁷⁴ and (2) the Russian Federation *versus* the Member States of the EU, the U.S., Canada, the UK, Albania, Iceland, Monaco, Montenegro, Norway, North Macedonia, Montenegro and Switzerland (airspace ban).⁷⁵

⁷² Juan Carlos Salazar, “Keynote Address by Secretary General of the International Civil Aviation Organization (ICAO), Mr. Juan Carlos Salazar, to the 2022 Annual Conference of the American Bar Association’s Forum on Air & Space Law” (16 September 2022) [unpublished], [online: <icao.int/secretariat/SecretaryGeneral/Documents/Addresses%20and%20Messages/2022_0916_Keynote_ABA%20Forum_Air_Space_Law.pdf>](https://www.icao.int/secretariat/SecretaryGeneral/Documents/Addresses%20and%20Messages/2022_0916_Keynote_ABA%20Forum_Air_Space_Law.pdf) at para 25.

⁷³ At the time of writing, the latest complaint was brought by the United Kingdom, Canada, Sweden, and Ukraine against Iran for the victims of flight PS752.

⁷⁴ Government of the Netherlands, “The Netherlands and Australia submit complaint against Russia to the International Civil Aviation Organization” (14 March 2022), [online: <government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao>](https://www.government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao).

⁷⁵ “Russia appealed to the ICAO Council in connection with the violation of the provisions of the Chicago Convention” (11 October 2023), [online: <ruavia.su/russia-appealed-to-the-icao-council-in-connection-with-the-violation-of-the-provisions-of-the-chicago-convention/>](https://ruavia.su/russia-appealed-to-the-icao-council-in-connection-with-the-violation-of-the-provisions-of-the-chicago-convention/).

The ICAO Council is, essentially, a political institution that has *ratione materiae* jurisdiction limited to the application and interpretation of the Chicago Convention and its Annexes. According to Milde:

The ICAO Council is a body of unique characteristics in the entire United Nations system of organizations. It possesses not only the typical administrative and management functions within the organization but it is endowed with functions of a law-making nature (called “quasi-legislative”) and functions in the settlement of differences (sometimes called “quasi-judicial”).⁷⁶

Although parties may appeal a decision of the ICAO Council to an *ad hoc* tribunal under Article 85 of the Chicago Convention or bring an appeal to the International Court of Justice (ICJ), they must first exhaust their “internal remedies” by way of the Convention-mandated ICAO dispute settlement procedure.⁷⁷ This takes time, and it may be that parties ultimately prefer to reach the ICJ as soon as possible to achieve a judgment of the world’s court rather than a political decision of ICAO Council.

While the ICAO Council sometimes exercises its quasi-judicial function to settle legal disputes between States, “its relative judicial independence or impartiality can hardly be achieved within the current framework of ICAO Council.”⁷⁸ In its defense, ICAO Council is unique: it is a political, technical, and administrative body that also has a judicial function. It is not a jury: its representatives speak for their States and not as individuals.⁷⁹ According to Hong, “[i]t is a qualified international arbitration conducted by States. Political considerations would always prevail over strictly legal argument since the representatives on the Council are obliged to follow the instructions of their States.”⁸⁰ It has also been said that the Council has “certain parameters ... [i]t is clearly not an adjudicatory body. The Council has rules of procedure which it must follow and it settles disputes rather than adjudicate them.”⁸¹

⁷⁶ Milde, *supra* note 11 at 151.

⁷⁷ An alternative system of dispute resolution has been proposed, including a ‘first step’ requirement of dispute mediation by the ICAO Council, and, if unsuccessful, referral to an ICAO Judicial Committee comprised of five qualified lawyers selected by the Council. See Rod D Margo, “Kicking and Screaming into the Twenty-First Century: A Practitioner’s Prescription for Updating the Chicago Convention” (1995) 20 *Ann Air & Space L* 49 at 59.

⁷⁸ Luping Zhang, *The Resolution of Inter-State Disputes in Civil Aviation* (Oxford: Oxford University Press, 2022) at 153.

⁷⁹ See James Low, “The ICAO Council: A Non-Proper Judicial Institution?” (2022) 47 *Ann Air & Space L* 3 at 21.

⁸⁰ Hong, *supra* note 30 at 295.

⁸¹ Ruwantissa Abeyratne, “Jurisdiction of the ICAO Council in the Settlement of Disputes - The Qatar Case” (2020) 45 *Ann Air & Space L* 483 at 490.

As such, the ICAO Council is not well equipped to handle decisions of a legal nature. It would benefit from independent expert legal advice, for instance, through a committee of legal experts to assist the ICAO Council Members with legal drafting, legal research and analysis, treaty negotiation, advocacy, and dispute resolution.

There are two ongoing initiatives that may assist in the development of a future committee or other mechanism for advising ICAO Council in future: the Civil Aviation Legal Advisers Forum (CALAF) and the Competency Framework for Civil Aviation Legal Advisers. The first meeting of CALAF, organized by ICAO's Legal Bureau, was held in Singapore in 2019, and the follow-up meeting was held in Oman in 2023. The Competency Framework was introduced at the 41st Assembly (2022) by way of a working paper.⁸² As the geopolitical tensions of our time put pressure on the international aviation community, ICAO is uniquely placed to balance the multipolarity that continues to evolve with reference to traditional, regional, and new (non-traditional) aviation powers. As Fitzgerald famously wrote in 1976:

It may be trite to say this, but it is nonetheless true that, if ICAO did not exist, it would have to be invented; otherwise, international civil aviation would not function with the safety, efficiency and regularity that it has attained today.⁸³

The number of seats on ICAO Council will be increased once again as soon as the requisite number of ratifications have been met. But this alone will not solve the challenge presented by the political nature of ICAO Council and of the aviation powers when it comes to disagreements between States. Instead, work must continue to improve the working of ICAO Council in terms of its legal knowledge and rigor of process in dispute settlement, otherwise the settlement of disputes provision in Article 84 of the Chicago Convention may continue to lack effectiveness and, in turn, frustrate States. Following such a dangerous path might ultimately reveal that the good intentions of the forefathers of the Convention to ensure a democratic shaping of the future of international air law were merely in vain. Let us hope, and work to ensure, that this is never the case.

⁸² ICAO, "Agenda Item 43: Other issues to be considered by the Legal Commission: Competency Framework for Civil Aviation Legal Advisers" (2022) ICAO Doc A41-WP/106, LE/6, online: <icao.int/Meetings/a41/Documents/WP/wp_106_en.pdf>.

⁸³ Gerald F Fitzgerald, "ICAO Now and in the Coming Decades" in Nicolas Mateesco Matte, ed, *International Air Transport: Law Organization and Policies for the Future* (Paris: Pedone, 1976) 47 at 50.